

No. 14713

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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BESSIE ROTH,

*Plaintiff and Appellant,*

*vs.*

SAMMY DAVIS, JR.,

*Defendant and Appellee.*

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## APPELLANT'S OPENING BRIEF.

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**Statement of Pleadings and Facts.**

This is an action for personal injuries. The jury found in favor of defendant Sammy Davis, Jr. Motion for new trial and motion for dismissal and to vacate the judgment were denied. This is an appeal from the verdict and judgment in favor of said defendant and from the denial of plaintiff's motion to vacate said judgment and for leave to dismiss without prejudice.

Paragraph I of plaintiff's complaint alleges that

"defendants (Will Mastin Trio, Sammy Davis, Jr., Sammy Davis, Will Mastin, DOE I-X) are citizens and residents of the State of California, and that plaintiff is a citizen and resident of the State of Ohio."

The Doe defendants have not been dismissed out of and are still parties to the action.

Plaintiff Bessie Roth was riding as a passenger in a Chrysler automobile which was being operated in a southerly direction on Kendall Drive in San Bernardino Coun-

ty, State of California, about 9 miles north of San Bernardino, California. A 1954 Cadillac crashed into the rear of the Chrysler, causing plaintiff to suffer serious and permanent injuries. The driver of the Cadillac was the well-known night club entertainer, Sammy Davis, Jr. He admitted on deposition that for several miles he had been following the Chrysler, 3-4 car lengths behind it and finally crashed into it. At the trial he told a completely fantastic story: that the Chrysler pulled over to the right, off the road and then immediately and suddenly backed up across the highway into his path. Photographs introduced into evidence show that the damage to the Chrysler was all in the rear and that there was no damage to its side.

Defendant Sammy Davis, Jr. lost an eye in the accident. Obviously and because of the sympathy for Davis and because of his tremendous popularity as a night club entertainer the jury found in his favor, despite an instruction that if they found that Davis was negligent and that such negligence was approximate cause of the accident their verdict must be for the plaintiff. The verdict was a horrible miscarriage of justice but since the court denied the motion for new trial, we do not discuss that phase of the case.

This Appeal is brought under the authority of 28 U. S. C. 1291.

### Statement of the Case and Question Involved.

The exact question presented by this appeal is now before this court in the case of *Molnar v. National Broadcasting Company, Inc.*, No. 14712, and is as follows:

WHERE A COMPLAINT NAMES CERTAIN UNKNOWN DEFENDANTS (DOES) AND ALLEGES THAT SAID UN-

KNOWN DEFENDANTS ARE CITIZENS AND RESIDENTS OF THE SAME STATE AS THE KNOWN, NAMED DEFENDANTS, WHICH STATE OF CITIZENSHIP AND RESIDENCE IS DIVERSE FROM THAT OF PLAINTIFF, DOES THE UNITED STATES DISTRICT COURT HAVE JURISDICTION OF THE CASE ON THE BASIS OF DIVERSITY OF CITIZENSHIP, ASSUMING THE AMOUNT IN CONTROVERSY TO BE IN EXCESS OF \$3000.00, EXCLUSIVE OF INTEREST AND COSTS?

In the *Molnar* case, Judge Mathes dismissed the action holding that complete diversity between the parties was not present and there was no jurisdiction over the subject matter. In the instant case Judge Harrison refused to dismiss the action or to vacate the judgment.

### Specification of Errors Relied On.

The sole error complained of on this appeal is that the court erred in refusing to dismiss the action and vacate the judgment since the court had no jurisdiction over the subject matter.

### Argument.

The allegations of the complaint in the *Molnar* case with regard to citizenship and residence of the Doe defendants are verbatim the same as those in the complaint in the instant case. With regard to those identical allegations, Judge Mathes held in the *Molnar* case:

It appearing to the Court:

(1) that the record in this cause does not disclose complete diversity of citizenship between the parties [28 U. S. C., §1332; *Indianapolis v. Chase National Bank*, 314 U. S. 63, 69-70, 76-77 (1941); *Parker v. Overman*, 18 How. (59 U. S.) 137, 141 (1855);

Mullen v. Torrance, 9 Wheat. (22 U. S.) 537, 538 (1824)];

(2) that there is no claim or cause of action asserted in the complaint which “arises under the Constitution, laws or treaties of the United States” [28 U. S. C., §1331; Gully v. First National Bank, 299 U. S. 109, 112-114 (1936); Puerto Rico v. Russell & Co., 288 U. S. 476, 483-484 (1933); Hooe v. United States, 218 U. S. 322, 335-336 (1910); Scribner v. Straus, 210 U. S. 352 (1908); Wade v. Lawder, 165 U. S. 624 (1897); Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46 (1888); Republic Pictures Corp. v. Security etc. Bank, 197 F. 2d 767 (9th Cir. 1952)];

(3) that inasmuch as facts requisite to federal jurisdiction [Fed. Rules Civ. Proc., Rule 8(a)(1), 28 U. S. C. A. 252 (1950)] do not affirmatively appear [Robertson v. Cease, 97 U. S. 646, 648-650 (1878); *Ex Parte* Smith, 94 U. S. 455, 456 (1876)], this court of limited jurisdiction [Shamrock Oil Co. v. Sheets, 313 U. S. 100, 108-109 (1941)] presumably lacks jurisdiction of the cause [Bors v. Preston, 111 U. S. 252, 255 (1884); Grace v. American Central Ins. Co., 109 U. S. 278 (1883); Turner v. Bank of North America, 4 Dall. (4 U. S.) 7, 11 (1800); New York Life Ins. Co. v. Kaufman, 78 F. 2d 398, 400 (9th Cir. 1935)];

It is Ordered upon the Court’s own initiative [Fed. Rules Civ. Proc. Rule 12(h), 28 U. S. C. A.] that the action is hereby dismissed for lack of jurisdiction over the subject matter [Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U. S. C. A.].

It is Further Ordered that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U. S. C. A.].



It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

February 10, 1955.

Wm. C. Mathes

United States District Judge

Endorsed: Filed Feb. 11, 1955. Edmund L. Smith, Clerk;  
by C. A. Simmons, Deputy Clerk.

Judgment Docketed and Entered Feb. 11, 1955, Edmund  
L. Smith, Clerk; by C. A. Simmons, Deputy Clerk.

### Conclusion.

Under the foregoing authorities it is urged that the court never had jurisdiction over the subject matter in this case and that, therefore, plaintiff's motion for leave to dismiss and to vacate the judgment should have been and should be granted.

Respectfully submitted,

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WM. JEROME POLLACK,

*Attorneys for Appellant.*

